

The Commonwealth of Massachusetts
OFFICE OF THE
DISTRICT ATTORNEY

BRISTOL DISTRICT

THOMAS M. QUINN III
DISTRICT ATTORNEY

888 Purchase Street
P.O. Box 973
New Bedford, MA 02740
(508) 997-0711

Nik Hatziefstathiou
MuckRock News
DEPT MR 64401
411A Highland Ave
Somerville, MA 02144-2516
64401-74087585@requests.muckrock.com

December 11, 2018

Re: Public Records Request
 Aaron Hernandez

Dear Mr. Hatziefstathiou:

This office received your request for public records on November 27, 2018 by e-mail. This response to your current request is provided timely, within ten business days of the receipt of the request. M.G.L. c. 66, § 10(a) (amended Stat. 2016, ch. 121, § 10).

You have requested a proffer agreement between the Bristol County District Attorney's Office and a named witness granting the witness immunity immediately before the jury trial and any notes or documents pertaining to the witness's alleged involvement, if any, in the Aaron Hernandez trial. Your request for disclosure is denied because the records that you requested are exempt from the statutory definition of public records and are protected from disclosure by other statutes, rules, case law, or court orders. M.G.L. c. 4, § 7, cl. 26; c. 66, § 10.

The Public Records Law requires this office to set forth the exemptions justifying the denial of your request. Please note the following exemptions to the Public Records Law:

1. Records Relating To Immunity Proceedings

Any records relating to immunity proceedings are not public records, as immunity proceedings are not part of a criminal prosecution and are closed to the public. M.G.L. c. 233, § 20E(b); *Commonwealth v. Mercado*, 466 Mass. 141, 151-152 (2013). Any records relating to immunity proceedings are therefore exempt from disclosure under the Public Records Law. M.G.L. c. 4, § 7, cl. 26 (a) ("specifically or *by necessary implication* exempted from disclosure by statute") (emphasis added).

2. Criminal Offender Record Information

Information about identifiable individuals related to their judicial proceedings is generally exempted from disclosure under the statute on criminal offender record information (CORI). M.G.L. c. 6, §§ 167, 172, 178. CORI is defined as “records and data in any communicable form compiled by a Massachusetts criminal justice agency which concern an identifiable individual and relate to the nature or disposition of a criminal charge, an arrest, a pre-trial proceeding, other judicial proceedings, . . . sentencing, incarceration. . . .” M.G.L. c. 6, § 167. The disclosure of criminal record information outside of the statutory procedures set forth in chapter 6, sections 167 through 175 is illegal. M.G.L. c. 6, § 178 (punishable by imprisonment up to one year or by a fine of \$7,500, or both). The 2010 amendments to the CORI statutes were intended, in part, to protect the privacy of individuals who are the subject of judicial proceedings, including criminal defendants, to prevent unfair discrimination, and to deter recidivism. *Commonwealth v. Pon*, 469 Mass. 296, 305-308 (2014). Further, the willful and unlawful dissemination of CORI is an actionable violation. M.G.L. c. 6, § 177; 803 C.M.R. 2:26. *Roggio v. Grasmuck*, 18 F.Supp. 3d 49, 53-54 (D.Mass. 2014) (successful suit for CORI violation committed by police officer in Massachusetts town); *Hamani v. Commonwealth Exec. Office of Pub. Safety & Sec.*, 2014 Mass. Super. LEXIS 193, *10 (Suffolk County, 2014).

Disclosure of CORI that could identify an immunized witness, M.G.L. c. 6, § 167, under the Public Records Law is contrary to both the language of the CORI statutes and their legislative intent. Under the Public Records Law, a requestor cannot be prohibited from publicly disclosing a document that was obtained through a public records request. See *Commonwealth v. Barnes*, 461 Mass. 644, 651 (2012) (heavy presumption against the constitutionality of prior restraint on public dissemination of communications). “[O]nce a record is deemed public it may be obtained by anyone upon request.” *A Guide to the Massachusetts Public Records Law*, Secretary of State’s Office, p.6 (2017). Therefore, immunity records are not subject to disclosure under the Public Records Law. They are subject to the criminal offender record information act and are not public records under G.L. c. 4, § 7, cl. 26 (a) (“specifically or by necessary implication exempted from disclosure by statute”). As noted above, the CORI statute prohibits the disclosure about identifiable individuals. G.L. c.6, §§ 167, 178.

The CORI statute only permits disclosure of CORI in particular situations, in most instances through the department of criminal justice information services (CJIS) for the specific purpose of protecting individual privacy rights. G.L. c. 6, §§ 167A, 172 (a), (l). *Hamani*, 2014 Mass. Super. LEXIS at *8-9. When properly obtained through CJIS, the requestor is prohibited from disseminating and from misusing such information, unlike dissemination through the Public Records Law. G.L. c. 6, §§ 172 (f), 178½. The records you requested are CORI and are exempt from the definition of public records. G.L. c. 4, § 7, cl. 26 (a) (“specifically or by necessary implication exempted from disclosure by statute”).

3. Individual Privacy Rights

Dissemination of CORI pursuant to the Public Records Law, as well as information about an immunized witness, would be inconsistent with the statutory protections provided to such persons and could result in a violation of individual privacy rights. M.G.L. c. 214, § 1B; M.G.L.

c. 4, § 7, cl. 26 (c) (materials related to a specifically named individual, that if disclosed would constitute an unwarranted invasion of privacy). See *Chalifoux v. Chalifoux*, 2017 U.S. App. LEXIS 13547, *5, n.5 (1st Cir. 2017) (claim of invasion of privacy under chapter 214, section 1B for disclosure of police report; court took no action).¹ Where the dissemination of these records would constitute an unwarranted invasion of privacy under chapter 214, section 1B, the records are exempt from the Public Records Law. M.G.L. c. 4, § 7, cl. 26 (a) (protected from disclosure by another statute), § 26 (c) (unwarranted invasion of privacy to a specifically named individual). Please be further advised that the trial judge in this matter issued an order, on February 10, 2014, restricting public dissemination of information that was not presented in the trial court. That order was not specifically rescinded and there is an appellate case that remains pending. *Commonwealth v. Hernandez*, SJC-12501.

4. Work-Product

Prosecutorial notes about witnesses constitute work product prepared and compiled in anticipation of litigation, demonstrating the prosecutor's thought processes. Those materials are exempted from the Public Records Law. M.G.L. c. 4, § 7, cl. 26 (d) ("inter-agency or intra-agency memoranda or letters relating to policy positions being developed by the agency"); *DaRosa v. New Bedford*, 471 Mass. 446, 461-462 (2015).

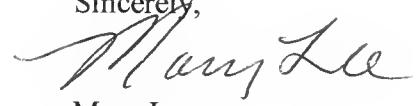
5. Statements of identifiable witnesses

Statements of identifiable individuals who served as witnesses and who reported information to the police are exempt from disclosure under the investigatory exception to the Public Records Law. M.G.L. c. 4, § 7, cl. 26(f). According to the *Massachusetts Guide to Public Records*, p. 20 (2017), "The legislature also designed the exemption to allow investigative officials to provide an assurance of confidentiality to private citizens so that they will speak openly about matters under investigation. Any details in witness statements, which if released create a grave risk of directly or indirectly identifying a private citizen who volunteers as a witness are indefinitely exempt." *Id.* citing *Globe Newspaper Co. v. Boston Retirement Bd.*, 388 Mass. 427, 438 (1983) (explanation of "identifying details" and "grave risk of indirect identification").

Where this letter constitutes a denial of the public records request, please be advised that you have the right to appeal to the Supervisor of Public Records and to seek a judicial remedy in Superior Court pursuant to 950 C.M.R. 32.06(3)(c); 950 C.M.R. 32.08(1); M.G.L. c. 66, §§ 10(b), 10A(a).

¹ The Commonwealth is immune from suit under the doctrine of sovereign immunity for violations of chapter 214, section 1B. *Whirty v. Lynch*, 27 Mass. App. Ct. 498, 500, rev. denied, 405 Mass. 1204 (1989); *Doe v. Holmes*, 2012 Mass. Super. LEXIS 266, *17 (Suffolk County, 2012). Immunity, however, cannot compel the Commonwealth to violate its own statutes that are designed to protect individual privacy. Further, the Commonwealth does not have immunity for willful violations of the CORI statute. *Whirty v. Lynch*, 27 Mass. App. Ct. at 500; M.G.L. c. 6, § 177.

Sincerely,

A handwritten signature in black ink, appearing to read "Mary Lee".

Mary Lee

Assistant District Attorney
Bristol District